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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 477.

SAMUEL KOHLBERG, *Petitioner,*

v.

CARL GRAY, Administrator of Veterans Affairs, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Dated: November 24, 1953.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Carl L. Shipley, on behalf of Samuel Kohlberg, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on August 27, 1953.

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 207 F. 2d 35 (J.A. 44).

Jurisdiction

The jurisdiction of this Court is invoked under 28 USCA 1254.

Questions Presented

1. Whether a person in the classified civil service, who has been charged with fraud, can be discharged therefrom in the absence of a specific finding of intentional fraud supported by clear and convincing evidence, where the regulation under which he is discharged requires that the fraud be "intentional"?

2. Whether where fraud is an issue, a finding of fraud which is not supported by "clear and convincing evidence" is a violation of due process?

Statutes Involved

Title 5 U.S.C.A. #652 (a) provides:

> "No person in the classified civil service of the United States shall be removed * * * except for such cause as will promote the efficiency of such service * * *".

Title 5 CFR, Section 9.101 provides:

> "The employing agency shall remove * * * any employee in the competitive service whose conduct or capacity is such that his removal * * * will promote the efficiency of the service. The grounds for disqualification * * * stated in Section 2.104 (a) (2) through (8) of this chapter shall be included among those constituting sufficient cause for removal * * *."

Title 5 CFR, Section 2.104 (a) (4) provides:

> "(a) * * * an eligible may be denied appointment for any of the following reasons:
>
> (4) Intentional false statements or deception or fraud in * * * appointment."

Statement of Case

Petitioner was given a war service appointment as Vocational Advisor, Veterans Administration, on October 1, 1945, and, after competitive examination, was converted to permanent status on April 27, 1948, subject to 5 CFR # 2.104. On September 27, 1949 petitioner was removed from his position on the ground of unsuitability for federal employment. On July 14, 1950 the Board of Appeals and Review, U. S. Civil Service Commission, made a final determination that petitioner was ineligible for employment by reason of a fraudulent answer to Question 36 (b) of Application Form 57.

Reasons for Granting the Writ

1. Petitioner, although a veteran, was entitled to the benefits of 5 USCA 652 (a), *Bailey* v. *Richardson*, 86 App. D. C. 248, 182 F. 2d 46, 53 aff'd. 341 U. S. 918; 5 USCA 679.

2. Under the applicable rules of the Civil Service Commission, petitioner could only be discharged from the federal service after a finding of *intentional* fraud. 5 C.F.R., Sec. 9.101 and 2.104 (a) (4).

3. Fraud must be established by "clear and convincing" proof. *Public Motor Service* v. *Standard Oil Co.*, 69 App. D. C., 89, 91, 99 F. 2d 124, 126; *Darnell* v. *Darnell*, App. D. C. No. 11298, decided November 13, 1952; *First National Bank* v. *Ford*, 30 Wyo. 110, 216 Pac. 691.

4. The Civil Service Commission discharged petitioner without making a finding of "intentional fraud" as required by 5 C. F. R. 2.104 (a) (4). This was a denial of due process of law in violation of petitioner's constitutional rights.

5. The Court below erred in holding that "intentional fraud" and "fraud" are interchangeable terms, and that the Civil Service Commission's findings of "evidence of

fraud'' was equivalent to a finding of ''fraud'' by clear and convincing evidence. There is no substantial evidence in the record to support any finding of fraud, much less ''intentional fraud''. An administrative finding not based on substantial evidence is a denial of due process. 2 Vom Baur, *Federal Administrative Law*, p. 568 (1942 ed.), cases cited. See also *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 95 L. ed. 456 (1950).

6. If the decision of the Court below is permitted to stand, the regulatory rights of civil servants, both veteran and non-veteran, will be gravely impaired, and their constitutional right of due process will be effectively nullified.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CARL L. SHIPLEY,
Attorney for Petitioner.

Dated: November 24, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 477

SAMUEL KOHLBERG, PETITIONER

v.

CARL GRAY, ADMINISTRATOR OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 24-25) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 44-46) is reported at 207 F. 2d 35.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1953 (R. 47). The petition for a writ of certiorari was filed on November 24, 1953.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether petitioner, an employee of the United States whose appointment was conditioned upon the satisfactory result of a subsequent investigation as to his qualifications and suitability for Federal employment, was properly removed from service after the Civil Service Commission determined, as a result of investigation, that he was disqualified by reason of fraud in appointment.

REGULATIONS INVOLVED

The pertinent portions of the Civil Service Regulations involved are set forth in the Appendix, *infra,* pp. 12-13.

STATEMENT

Effective October 1, 1945, Samuel Kohlberg received a war service indefinite appointment as a Vocational Advisor with the Veterans Administration at New York, New York (R. 10). On December 17, 1946, Kohlberg filed a Standard Form 57 of the Civil Service Commission applying for a permanent appointment as Vocational Advisor (R. 10-11). He competed in an open competitive examination for this position and under date of March 15, 1948, received notification from the Board of the United States Civil Service Examiners, Veterans Administration, to the effect that he had received an eligible rating for the position as Vocational Advisor (R. 19-20). This notice of rating stated on its face that the eligible rating assigned to Kohlberg

was "subject to inquiry" (R. 20). Effective April 27, 1948, Kohlberg was notified of his conversion, "subject to investigation", from a war service indefinite to a competitive status, in the position of Vocational Advisor (R. 20, 27).

A regular and confidential suitability investigation of Kohlberg was thereafter conducted by Civil Service Commission investigators. This investigation revealed that on his Form 57 Kohlberg claimed conferment of an M. A. degree, whereas, although he had completed the necessary courses he had never received this degree. On his loyalty questionnaire he had denied ever using an alias, whereas he had used the surname Heckler when arrested in 1925; and he failed to admit that he had been discharged from his Army Commission on January 3, 1945, under other than honorable conditions (R. 12, 21). Kohlberg was directed to appear before a representative of the United States Civil Service Commission and bring with him information in regard to his marital status and discharge from the military service (R. 11). On September 7, 1949, Kohlberg appeared before an investigator of the Civil Service Commission and was informed of the nature of the derogatory information revealed in the course of the investigation of his suitability for Federal employment and was permitted to give a detailed explanation of the derogatory information (R. 29-36).

The confidential report of the suitability investigation of Kohlberg and the report of the Special Hearing accorded him was then considered by the Second Regional Office of the Civil Service Com-

mission (R. 21). In a decision rendered on September 23, 1949, Kohlberg was rated as ineligible on suitability. His pending application and existing eligibility on Civil Service registers were cancelled (R. 21), and the Veterans Administration was directed to terminate his services (R. 12-13, 21). This decision by the Second Regional Director was transmitted to the Manager of the New York Veterans Administration Regional Office in a letter of September 23, 1949 (R. 21). The letter (R. 12-13) detailed the derogatory information concerning Kohlberg and stated that his explanation was not considered satisfactory. A copy of the letter was sent to Kohlberg (R. 13). The Personnel Officer of the New York Veterans Administration Office then notified the Second Regional Office that in accordance with the instructions contained in the letter of September 23, 1949, Kohlberg was to be separated effective at the close of business October 26, 1949 (R. 21-22).

On October 15, 1949, Kohlberg sent three letters addressed to the Regional Director of the Commission's Second Regional Office requesting "reconsideration or an appeal and request for hearing under appropriate authority" (R. 22). Numerous exhibits were submitted relating to the derogatory information previously brought to Kohlberg's attention by the Commission's investigator in the hearing of September 7, 1949, and the Commission's letter of September 23, 1949. The entire file was then transmitted to the Commission's Board of Appeals and Review in Washington, D. C. for con-

sideration. After considering the file, the Board returned the file to the Commission's Second Regional Office directing that a further investigation be made in order to ascertain whether or not Kohlberg would have had reason to know that his discharge from the Army on January 3, 1945 was not under honorable conditions (R. 22). An inspection of the confidential records of the Department of the Army was made and the file was again forwarded to the Board of Appeals and Review.

After a consideration of the entire record the Board of Appeals and Review affirmed the adverse decision of the Second Regional Office, advising Kohlberg that "the information on hand concerning your separation as an officer in the military service discloses that such separation does not entitle you to imply that it was either honorable or satisfactory" (R. 39). At Kohlberg's request the Board of Appeals and Review then granted him a personal hearing and his case was given personal consideration by the Civil Service Commission (R. 40-41). Again, Kohlberg was advised of the affirmance of the decision of the Second Regional Office on the ground that "evidence of fraud is shown in connection with your appointment in the Veterans Administration" (R. 42).

Kohlberg then brought this action against the Administrator of Veterans Affairs and officials of the Civil Service Commission, in the District Court for the District of Columbia, for a declaration that his removal was "illegal, made in excess of statutory jurisdiction, arbitrary and in bad faith"

(R. 6), and that he had been denied the procedural guarantees of the Veterans Preference Act, as amended, 5 U. S. C. 851 *et seq.* (R. 5). On motions for summary judgment the district court held that as Kohlberg's conversion to competitive status was made "subject to investigation", he was not a "permanent or indefinite preference eligible" (5 U. S. C. 863) and therefore not entitled to the guarantees of the Veterans Preference Act (R. 24-25). The court ordered the complaint dismissed (R. 43) and on appeal the court of appeals affirmed (R. 47).

ARGUMENT

1. Petitioner's conversion from a war service indefinite appointee to a competitive status was "subject to [an] investigation" of his qualifications for Federal employment (R. 27; 5 C. F. R. 2.112; 5 C. F. R. 5.2, *infra*, p. 12); such an investigation might have been "made at any time within eighteen months of the personnel action" (5 C. F. R. 2.112 (b)) and, in the event the investigation disclosed that he was disqualified for Federal employment, the Civil Service Commission was authorized to order his removal.

The petitioner does not dispute either the applicability or the controlling effect of these regulations; nor does he urge this Court's consideration of the only determination made by the district court and the principal holding of the court of appeals, *viz*: that Kohlberg's appointment to competitive status having been made "subject to investigation," he was not, upon removal, entitled to the pro-

cedural benefits accorded "permanent or indefinite preference eligibles" by Section 14 of the Veterans Preference Act.[1] See *Kirkpatrick* v. *Gray*, 198 F. 2d 533 (C. A. D. C.), certiorari denied *sub nom. Priestly v. Donaldson*, 344 U. S. 880; *Friedman* v. *Schwellenbach*, 159 F. 2d 22 (C. A. D. C.), certiorari denied, 330 U. S. 838. Rather, the petition (Pet. 2-4), in effect, asks this Court to review the evidence upon which the Civil Service Commission based its finding that his conditional appointment to Federal employment was tainted with fraud.[2] The court below properly declined to inquire into "the guilt or innocence of the employee as to the charges upon which he was removed" (R. 46). In so doing the court acted in conformity with the well settled principle of judicial non-interference with executive determinations as to the qualifications and suitability of applicants for Government employment. *Decatur* v. *Paulding*, 14 Pet. 497; *Keim* v. *United States*, 177 U. S. 290; *Eberlein* v. *United States*, 257 U. S. 82; *White v. Berry*, 171 U. S. 366; *Carter* v. *Forrestal*, 175 F. 2d 364 (C. A. D. C.), certiorari denied, 338 U. S. 832; *Siskind* v. *Morgenthau*, 152 F. 2d 286 (C. A. D. C.); *Friedman* v. *Schwellenbach*, 159 F. 2d 22 (C. A. D. C.) certiorari denied, 330 U. S. 838; *Love* v. *United States*, 108 F. 2d 43

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[1] 58 Stat. 390, as amended, 61 Stat. 723, 63 Stat. 1067 (5 U.S.C., Supp. V, 863).

[2] The Civil Service Regulations expressly provide that: "An applicant [for Federal employment] may be denied examination and an eligible may be denied appointment for any of the following reasons: * * * (4) Intentional false statements or deception or fraud in examination or appointment." 5 C.F.R. 2.104(a)(4).

(C. A. 8), certiorari denied, 309 U. S. 673; *Levine* v. *Farley,* 107 F. 2d 186 (C. A. D. C.), certiorari denied, 308 U. S. 622.

We submit that the principle discussed above, supported by the cited decisions, is dispositive of petitioner's case, and that the court below properly declined to inquire into the correctness of the Commission's finding of fraud.

It is clear, however, that there was ample factual justification for the Commission's finding. The Second Regional Office of the Civil Service Commission based its original removal order upon the undenied and unsatisfactorily explained facts that, on his Form 57, petitioner claimed the conferment of an M. A. degree although he had never received such a degree; that on his loyalty questionnaire petitioner denied having used an alias, whereas he had used the surname "Heckler" when arrested in 1925; and that petitioner had failed to admit that he had been discharged from his Army Commission on January 3, 1945 under other than honorable conditions.

The adverse action of the Second Regional Office was affirmed by the Board of Appeals and Review of the Civil Service Commission only after it had directed a further inquiry into the question of whether petitioner "would have had reason to know that his discharge from the Army on January 3, 1945, was not under honorable conditions" (R. 22) and only after petitioner had been given a hearing before the Board (R. 24) and after consideration of

his case by the Civil Service Commission (R. 24, 40-41).

It is true that the Board of Appeals and Review did not consider petitioner's representations with respect to his educational qualifications and his use of an alias, "standing alone sufficiently material to warrant a finding of ineligibility" (R. 40), but this generous view hardly militates against the Board's ultimate determination that the circumstances surrounding his separation from the Army and his failure to disclose candidly such circumstances were "evidence of fraud" (R. 42) and proper grounds for removal.[3]

2. Petitioner's contention that his removal from the service was effected by the Commission without due process of law (Pet. 2-3), is without merit. Civil Service Rule V [4] authorizes the Civil Service Commission to make appointments conditioned upon a subsequent determination that the requirements of law or Civil Service Rules and Regulations have been met (5 C. F. R. 5.2), and where it is found that an individual is disqualified for Federal employment, the Commission is authorized to order

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[3] Petitioner's insistence that he could be properly removed from the service under 5 C. F. R. 2.104(a)(4) only for "intentional fraud" (Pet. 2, 3) is based upon a distortion of the plain language of 5 C. F. R. 2.104 (a)(4), *supra*, n. 2. As the court below said (R. 46), " 'unintentional fraud in examination or appointment' would be a contradiction in terms. Thus 'fraud' in the [context of 2.104(a)(4)] is exactly equivalent to 'intentional fraud'. It is therefore immaterial that the Commission did not use the redundant term, whether the regulations used it or not."

[4] Executive Order No. 9830, February 24, 1947 (3 C. F. R., 1947 Supp., p. 112.)

his removal (5 C. F. R. 2.112(a)). The procedural requisites for effecting the removal of such appointees appear in Section 5.4 of Rule V and require that the employee be given due notice of the Commission's determination and an opportunity to explain, and that the facts be certified to the proper appointing officer with specific instructions as to discipline or dismissal.

It affirmatively appears from the record that all of these requirements were fully met in petitioner's case (R. 12-13, 14, 15-16, 29-36, 37-38, 39, 40-42), and the petition contains no assertion to the contrary. Accordingly, the contention that petitioner's discharge was effected without due process of law, predicated, as it is, solely on an unsupported and erroneous assumption that the Commission's finding of fraud is not supported by clear and convincing evidence (Pet. 2, 3), is manifestly without substance.[5] *Angilly* v. *United States*, 199 F. 2d 642 (C. A. 2); *Carter* v. *Forrestal*, 175 F. 2d 364 (C. A. D. C.), certiorari denied, 338 U. S. 832.

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[5] Petitioner mistakenly refers to 5 C.F.R. 9.101 as being applicable to his case (Pet. 3). Section 9.101 pertains to an *agency's* responsibility for separation or demotion and, *inter alia*, limits the agency removal or demotion power to cases where removal or demotion is for "such cause as will promote the efficiency of the service and in accordance with the procedure prescribed in § 9.102." Section 9.102, however, has no application to petitioner as is apparent from the concluding sentence of Section 9.102(a), which reads as follows: "The procedural requirements of this section *shall not apply to any person * * * whose removal is requested by the Commission under § 5.4 of this chapter.*" (Emphasis added.)

CONCLUSION

The decision of the court below is clearly correct, there is no conflict of decisions, and further review is not called for. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER, 1953.

APPENDIX

5 C. F. R. 5.2 provides:

§ 5.2 *Authority of the Commission to make investigations.* The Commission may make appropriate investigations to secure enforcement of the Civil Service Act, Rules, and Regulations, including investigation of the qualifications and suitability of applicants for positions in the competitive service. It may authorize appointments conditioned upon a subsequent determination that the requirements of law or the Civil Service Rules and Regulations have been met.

5 C. F. R. 2.112 provides:

§ 2.112 *Appointments subject to investigation.* (a) The following types of appointments shall be made subject to investigation:

* * * * *

(6) Conversions from excepted, war service indefinite or temporary indefinite appointments to competitive appointments.

* * * * *

(b) Investigation to establish the individual's qualifications may be made at any time within eighteen months of the personnel action and removal may be ordered by the Commission if such investigation discloses that the individual is disqualified for Federal employment.

* * * * *

5 C. F. R. 2.104 provides:

§ 2.104 *Disqualifications of applicants—*

(a) An applicant may be denied examination and an eligible may be denied appointment for any of the following reasons:

* * * * *

(4) Intentional false statements or deception or fraud in examination or appointment.

* * * * *

5 C. F. R. 5.4 provides:

§ 5.4 *Authority of the Commission to issue instructions as to discipline or separation.* Whenever the Commission finds that an appointment has been made in violation of the Civil Service Acts, Rules, or Regulations, or that any employee subject thereto has violated such Act, Rules, or Regulations or is holding a position in violation thereof, it is authorized, after giving due notice and opportunity for explanation to the employee and the agency concerned, to certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal.

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